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No. 00-110

IN THE SUPREME COURT OF THE UNITED STATES

TERRY STEWART,
Director, Arizona Department of Corrections, et al.,
Petitioners,

v.

JOE CLARENCE SMITH, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Is certiorari appropriate to review a circuit court of appeals decision based on a review of the district court's application of admitted facts to well settled principles of law?

2. Does certiorari lie to review a circuit court of appeals opinion involving a straightforward, case-specific application of Strickland v. Washington to unique facts which were not contested by the parties?

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PARTIES TO THE PROCEEDING BELOW

The Petitioner Stewart is the head of the Arizona State Department of Corrections. The Respondent Smith is a prisoner in that system.[1]

STATEMENT OF FACTS AND STATEMENT OF THE CASE

The State's statement of facts is both incomplete and inaccurate. For that reason, we repeat here the relevant facts as described by the decision below, for the Court's convenience:

> On January 1, 1976, officials of the Maricopa County Sheriff's Department found the nude body of Sandy Spencer in the desert outside Phoenix. One month later in a different desert location, police discovered the nude body of Neva Lee. Both teenage hitchhikers had been suffocated by having dirt forced into their mouths, which were taped shut. The assailant stabbed both women multiple times, punctured them with needles, and bound their wrists with rope.
>
> Smith, who was on probation from a rape conviction, became the prime suspect. Police put him under surveillance. When that failed to produce probable cause for an arrest, police had a female officer pose as a hitchhiker to lure Smith into committing false imprisonment or battery. He eventually picked up the officer, took her to his father's machine shop, and grabbed her by both arms. After a prearranged signal, police entered and arrested him for false imprisonment.
>
> During Smith's imprisonment, police questioned him about the Lee and Spencer murders. At first, he denied his involvement. But months later, at his own initiation, Smith gave investigators a bizarre account of the Lee slaying. He told police that he was present at the crime because a friend, John Jameson, forced him at gunpoint to drive the victim to the desert. Once there, Jameson ordered Lee to have sexual intercourse with Smith in order to frame Smith for her rape. Smith said Jameson then decided to kill Lee. His account conflicted with some physical evidence found at the scene. Smith later contended that he told police no such story.

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[1]To avoid confusion, Petitioner will be referred to collectively as the State and Respondent as Smith.

Smith went on trial for the Lee murder first. Throughout the trial, he maintained his innocence, contending that other people committed the crime and that investigators conspired to frame him. Jameson testified at the trial. He denied being present at the murder, but said that a man known as "Squirrel" bragged about killing two women and showed Jameson pictures of the dead women. The jury returned a general verdict finding Smith guilty of murder.

Smith then went on trial for the Spencer slaying. The following day, he pleaded guilty to the crime shortly after Di Anne Jameson-Smith's girlfriend, John Jameson's ex-wife, and a key prosecution witness-told the court that she had been improperly contacted by a defense investigator and by Smith's mother. During the plea colloquy, the prosecutor expressed doubts about Smith's emotional stability to enter a voluntary plea. Nonetheless, the trial court accepted the plea. Three weeks later, Smith unsuccessfully sought to withdraw the plea, explaining that he had only pleaded guilty out of concern that his parents and Ms. Jameson would be arrested.

At Smith's sentencing for both convictions, his trial counsel, Stephen Rempe, offered the deposition testimony of a psychiatrist, Dr. Jacob Hoogerbeets, and the live testimony of a psychologist, Dr. Faye Goldberg. At that time, Arizona's death penalty statute, formerly A.R.S. § 13-454, restricted the presentation of mitigating evidence to a list of statutory mitigating factors. Rempe offered Hoogerbeets' and Goldberg's testimony solely to establish one statutory mitigating factor: significant impairment of Smith's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law.

Dr. Hoogerbeets originally had been appointed by the court to evaluate Smith's competency to stand trial in March 1977. At that time, Hoogerbeets told the court that Smith did not suffer from any mental disability. Nonetheless, by July, with no additional interviews of Smith, Hoogerbeets testified in his deposition that Smith was a borderline psychotic who may have had a "compulsion" to commit the crimes. During the August sentencing, Dr. Goldberg also testified that Smith's emotional tension built up to such an extent that at the time of crimes he had an overwhelming "compulsion" to kill. The state rebutted this compulsion theory with the testimony of psychiatrist Dr. Michael Cleary, who also had interviewed Smith to determine his competency to stand trial. Dr. Cleary, after an hour interview, determined that Smith was not impaired in his ability to conform his conduct to the law and suffered from no significant mental defect. The court found no mitigating circumstances and three aggravating circumstances warranting the death penalty.

On appeal in 1979, the Arizona Supreme Court remanded Smith's case for resentencing in light of changes to the state's death penalty statute. Rempe now

could present any mitigating evidence on behalf of Smith, including additional evidence of mental illness not rising to the level of an impairment of Smith's capacity to conform his conduct to the law. Instead, at Smith's resentencing, Rempe simply resubmitted Dr. Hoogerbeets' and Dr. Goldberg's testimony under the same statutory mitigating factor, without recalling them to testify or presenting other evidence of mental or emotional disturbance. In fact, Rempe had never tried a death penalty case before and he had no idea what mitigating evidence he could present. He even asked the court to help him out, a request that was ignored.

At resentencing, the judge found that Dr. Hoogerbeets' and Dr. Goldberg's testimony alone did not support the statutory mitigating factor of significant impairment, and so the court said it would not consider Dr. Cleary's testimony. The court also said it was not limiting its consideration of any mitigating circumstance in concluding that no mitigating factors existed which would call for a sentence other than death. In addition to resubmitting this expert testimony, Rempe reargued the constitutionality of Arizona's revised death penalty statute, a standard "form" motion of the public defenders office. He also repeated the recommendation of a supplemental presentence report, which suggested that the court appoint another examining psychiatrist. The court denied the request. Repeating his unsuccessful argument from Smith's first sentencing, Rempe briefly argued that life in prison would be a more "heinous" punishment than death. The court again found aggravating circumstances and no mitigating circumstances in sentencing Smith to death.

On direct appeal, the Arizona Supreme Court affirmed Smith's conviction and death sentence. State v. Smith, 638 P.2d 696 (Ariz.1981). He then brought a series of post-conviction relief petitions in the state courts. After the third of those petitions was decided adversely to him, Smith proceeded with the current federal habeas action in the district court.

Smith v. Stewart, (1999).

In the district court Smith raised 34 issues of constitutional deprivation, including ineffective assistance of counsel for failure to investigate and present mitigation during the resentencing hearing. Smith specifically alleged that had counsel investigated he would have discovered lay testimony which described behavior which was consistent with mental illness. This testimony in turn would have corroborated and bolstered the credibility of the expert witnesses whose opinions had been discounted by the state courts.

It is important to note that the State never disputed the following material critical to the circuit court of appeals opinion in this case:

* Trial counsel conducted no investigation on resentencing because he did not know what to investigate.
* Trial counsel did not present additional mitigation at resentencing because he did not understand what constituted mitigation.
* Trial counsel did not attack the aggravating circumstances because he did not know that he could.
* Trial counsel limited the trial court's consideration of psychiatric evidence on resentencing to statutory mitigation even though, faced with the exact same evidence at the previous sentencing, the exact same judge had found that the evidence did not establish a statutory mitigating circumstance and the Arizona Supreme Court agreed with that ruling.
* That Larry Maddox (Smith's pastor) and Richard Todd (Smith's court appointed investigator) believe that Smith possesses multiple personalities.
* That Debbie Lippiett (Smith's former girlfriend) testified in another proceeding that Smith is subject to wide-ranging mood swings.
* That Smith's attorney failed to develop positive prisoner evidence which was readily available.

As to this ineffective assistance of counsel claim, the state moved for summary judgment on the sole basis of procedural bar. Smith responded in full compliance with Fed.R.Civ.P. 56(e).The district court found against the state on this issue and notifiefd the parties that it

intended to consider the merits of the claim. Additional briefing followed. The state never disputed the facts Smith alleged to support relief on this claim. At the state's urging, the district court decided the merits of Smiths' ineffective assistance of counsel at resentencing claim without a hearing because material facts were not in dispute. Following merits review, the district court concluded that Smith had not been denied effective assistance of counsel at his capital sentencing hearing.

On appeal, the court of appeals was faced with a straightforward review of the district court's application of the undisputed facts to the legal principles of Strickland v. Washington, 466 U.S. 668 (1984).[2] It was against this procedural backdrop that the circuit court of appeals engaged in its appellate review. Relying on a case specific analysis of the uncontested facts in the district court record, the circuit court found that trial counsel's performance was constitutionally deficient.

> For Smith's first sentencing in 1977, Rempe presented the testimony of Dr. Hoogerbeets and Dr. Goldberg. The entire focus of this testimony was to prove that Smith met the only mitigating factor available to him under Arizona law at that time: that Smith's ability to conform his conduct to the law at the time of the crimes was significantly impaired. Both doctors, therefore, focused on "inner

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[2]Because the court found prejudice under Strickland it did not reach Smith's argument that he need not show prejudice because trial counsel's performance, essentially stipulating to a death sentence, was so deficient that prejudice must be presumed. See United States v. Cronic, 466 U.S. 648 (1984). However, the court did observe:

> We have no doubt that Rempe's performance was deficient. He failed to investigate, develop, and present evidence of Smith's mental condition which did not rise to the level of the statutory mitigating factor of significant impairment. He failed to introduce any additional mitigating evidence that might call for leniency. He failed to call any witnesses on Smith's behalf at the resentencing. *This case is more akin to those situations in which defense counsel failed to present any mitigating evidence at all.*

Smith v. Stewart, 189 F.3d at 1008 (emphasis added).

conflicts" and "tension" that Smith suffered which would have caused a compulsion to act at the time of the crimes. Dr. Hoogerbeets described Smith's problem as "compulsory aberrant actions." The thrust of Dr. Goldberg's testimony was to present Smith as a "multiple sadistic sex slayer" who kills under a compulsion in order to reduce his mounting emotional tension. As Dr. Goldberg put it, the tension "mounts to such an extent that the intellectual processes are suspended and accompanying that may be a loss of memory about the events, partially or completely." This compulsion theory was necessary to provide any mitigation for Smith under the prior invalid statute. It is significant that both Dr. Hoogerbeets and the state's rebuttal psychiatrist, Dr. Cleary, originally had been asked to evaluate Smith to determine if he met the M'Naghten test for legal insanity. Arizona's statutory mitigating factor requires a similar, though less stringent, focus on the defendant's ability to behave "normally" at the time of the crimes.

Even at the first sentencing, Dr. Hoogerbeets' testimony had severe credibility problems. His insanity evaluation described Smith as having no mental disabilities. Yet a few months later, with no further evaluation, he testified that Smith was a borderline psychotic. Moreover, he only interviewed Smith for an hour. It is not surprising that the trial judge and the Arizona Supreme Court discounted his testimony.

Yet by the time of Smith's resentencing in 1979, his attorney had no qualms about resting on the testimony of these two experts, whose opinions the court previously rejected as not rising to the level of mitigation. Even the Arizona Supreme Court found the testimony of these experts to be "inexplicit and often equivocal." State v. Smith, 638 P.2d 696, 701 (Ariz.1981). As a result of the Arizona Supreme Court's remand for resentencing, Rempe now could present any evidence bearing on Smith's mental and emotional condition, as well as his background and character, that might avoid the penalty of death. Instead, he did nothing. He did not do any investigation. He did not even recall Dr. Hoogerbeets and Dr. Goldberg for additional testimony about Smith's mental condition irrespective of his "compulsive" tendencies at the time of the crimes. It is clear that there was other evidence counsel could have raised that would have strengthened the case for mitigation. The defense's own investigator witnessed evidence of multiple personalities. A friend of Smith's who was also a pastor believed that Smith possessed multiple personalities. An investigation into his family background would have revealed that Smith suffered from serious psychosexual problems stemming from developmental problems and conflicts with his parents. His antisocial, egocentric, paranoid, manic and impulsive behaviors marked Smith with a sociopathic or psychopathic character disorder. Rempe also could have pointed to Smith's good relationship with his girlfriend. See Smith v. Stewart, 140 F.3d 1263, 1271 (9th Cir.1998) (noting that good family relationships are

relevant mitigating evidence).

The failure to investigate Smith's background and mental illness was not a strategic decision. Rempe had never tried a death penalty case before. In an affidavit submitted to the court, Rempe admitted that he did not investigate Smith's case for mitigating evidence, even though he had more than four months to prepare for the resentencing. He did not understand what evidence constituted mitigating evidence. An exchange with the judge is illustrative of Rempe's complete failure to provide even a minimal defense to help spare Smith from death:

> REMPE: I only have really one area of mitigation that I was asking the Court to consider and that was under the old statute where the defendant knew right from wrong but yet it was still a McNaughton [sic] defense. I don't know how that reading, the new statute or reading State v. Watson stating that we can present any mitigating circumstances, I don't know what posture I would have to present that in other than to reurge the Court to consider ... the deposition of Dr. Hoogerbeets and the testimony of Dr. Goldberg, taking the standard that was enunciated in the code as to a possible mitigating factor, but I really show my ignorance-
> How would that work in State v. Watson? We are to consider all relevant mitigating factors. I don't know what the standard is now. Therefore, I am in essence asking the court what our stand would be.
> COURT: I would suggest that you present anything you, in your opinion or imagination, feel is a mitigating circumstance.
> REMPE: The only two things, as I had indicated, would be what the State said they already read.... I would move both of those items [Hoogerbeets' and Goldberg's testimony] to be introduced in evidence and to be considered by the Court as mitigation and as to any argument, it will be rather brief and I would make it the day of sentencing.

At the sentencing hearing, the prosecution offered no additional evidence. Rempe briefly argued that the new death penalty statute still suffered from constitutional problems, even though two other courts had rejected that argument. He asked the sentencing judge to consider the recommendation of a probation officer in the supplemental presentence report to appoint another psychiatric expert, a request the court rejected based on what it perceived as a lack of supporting evidence from Hoogerbeets and Goldberg. Finally, Rempe reiterated the few sentences that he made at the first sentencing: "If we are looking to punish Mr. Smith, I can't think of a more heinous type of punishment than to lock someone up at the Arizona State Prison for the rest of his life."

> Furthermore, Rempe even ignored the prosecutor's own doubts at Smith's guilty plea hearing as to Smith's lack of emotional stability. The prosecutor's comment should have set off fireworks for Rempe. He should have seized the opportunity to pursue any supporting evidence about Smith's background and mental condition, but he did not. ... In all, there is no doubt that Rempe effectively presented no defense on Smith's behalf, amounting to abandonment of his client to the fate of death.

Smith v. Stewart, 189 F.3d at 1009-1010.

Once determining that counsel fell below the minimum standards of competent counsel, the circuit court went on to conduct a similarly case-specific analysis of the prejudice to Smith. The court began by recognizing that in Arizona the death penalty is mandatory if a single aggravating circumstance is found to exist and the mitigation is not "sufficiently substantial" to outweigh it. "It was therefore critical under this scheme and in Smith's particular circumstances that ocunsel attempt to investigate and present the strongest possible case for mitigation." Smith v. Stewart 189 F.3d at 1012 (internal quotations omitted). The court next observed:

> Additional evidence of Smith's mental illness and background was readily available to Rempe which, cumulatively, might have had an effect on the sentencing judge. Richard Todd, a court-appointed investigator, witnessed Smith's "second personality" during their conversations. Smith had called himself John Jameson and talked as if he was Jameson on several occasions. His manner would change and he talked in the third person, at one time revealing the location of other murders. Todd told Rempe of these conversations. A friend of Smith's, Rev. Larry Maddox, also told the prosecutor during Smith's 1976 rape trial that Smith possessed multiple personalities. Rempe could have learned this information from Smith's previous attorney. Smith's former girlfriend, Debbie Lippiett, testified during the rape trial that Smith suffered from wide-ranging mood swings. At least, this information should have been furnished to Smith's psychiatric experts to strengthen their conclusions, making their testimony less "inexplicit and equivocal" to the judge. Without it, Smith's defense was undercut. See Bean, 163 F.3d at 1081. A lawyer who should have known but does not inform his expert witnesses about essential information going to the heart of the defendant's case for mitigation does not function as "counsel" under the Sixth Amendment. See Caro v. Calderon, 165 F.3d 1223, 1228 (9th Cir.1999).

Id.

The appellate court reviewed the district court record, noting an expert report prepared after an investigation of Smith's background was finally conducted. The court concluded, given the facts of this case, that absent counsel's unprofessional errors there is a reasonable probability that the result of the proceeding would have been different.

REASONS FOR DENYING THE WRIT

Nothing in the opinion below warrants this Court's certiorari review. It is not a decision on an issue of federal law that conflicts with a decision of another federal or state court. It is not a decision that errs in its application of the law. It is instead a decision based on a careful and thorough review of the unique facts and evidence presented and a reasonable application of those facts to the settled law. For these reasons, this Court should deny certiorari. See United States v. Johnston, 368 U.S. 220, 227 (1925)("We do not grant certiorari to review evidence and discuss specific facts").

I. THE CIRCUIT COURT OF APPEAL'S DECISION, BASED ON UNCONTESTED FACTS, IS WHOLLY CONSISTENT WITH SETTLED PRINICPLES OF SUMMARY JUDGMENT

The state has never disputed the facts underlying this claim. The District Court's order denying this claim was based entirely on the application of law to these undisputed facts.

The State now alleges, however, for the first time, that Petitioner's facts cannot be used to defeat a summary judgment motion. That allegation comes too late. The State never disputed the facts underlying Petitioner's Strickland claim in the district court. As a result, the State "waived [its] argument as to the presence of genuine issues of material fact because [it] did not preserve it for appeal by raising it before the district court." Sullivan v. Lemoncello, 36 F.3d

676, 678 (7th Cir. 1994).

The State also never disputed the facts supporting this claim in its appellate briefs to the court of appeals. Even now, the State points to nothing in the record establishing a factual dispute. That is because none exists.

The State also newly alleges that the undisputed facts have no record support. That allegation is similarly unfounded. The facts relied on by the court of appeals are contained in the sworn testimony from another proceeding of Debbie Lippiett, the deposition of Richard Todd, an interview by the trial prosecutor with Rev. Larry Maddox, and the report of Dr. Phillip Tatro. The substance of each witnesses testimony was detailed in the pleadings.[3]

The State now claims that they did not have notice of Dr. Tatro's report. This is not true. In the State's pleading following the district court's procedural default rulings, the State discussed the substance of Dr. Tatro's report and argued that it was insufficient to prove prejudice.

Certainly, if Smith had been given the opportunity to present evidence at a hearing, as he requested, his witnesses, including Dr. Tatro would have testified. However, the State prevailed on its request to go forward without a hearing having previously admitted the truth of Smith's factual allegations in order to convince the district court to grant summary judgment in its favor. These undisputed facts are sufficient to support Smith's Strickland claim. See e.g., Smith

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[3]The State also appear to complain that the description of the witness's testimony is conclusory. This is untrue. Each of the witnesses were reported to described specific behaviors, such as change in voice and facial expression when taking on a new persona, or experiencing wide-ranging mood swings, all of which led the lay witnesses to conclude that Smith had multiple personalities.

(Bernard) v. Stewart, 140 F.3d 1263, 1269 (9th Cir. 1998)(evidence of personality problems, prior drug use, good family relationships and existence of habeas petitioner's children found in presentence report should have been presented by sentencing counsel).

Relying on Weisgram v. Marley, ___ U.S. ____, 120 S.Ct. 1011 (2000), the State complains that despite telling the court that a hearing was not necessary to resolve the material disputed facts on this claim and despite never once disputing any fact supporting this claim, Smith somehow should have known that the state did dispute the facts. Noting that it moved for summary judgment only on procedural grounds, petitioner unabashedly asserts that "[b]ecause procedural default means that the district court should not address the merits, the state's assertion of that defense was certainly the functional equivalent of Marely's objections in the district court to weisgram's proposed expert testimony." Petition at 16. The state's desperate attempt at recasting its deliberate strategy and actions taken to prevent an evidentiary hearing is entirely unsupported by the record. In its merits briefing, the state successfully argued that the district court should resolve the ineffective counsel claim as a matter of law, without a hearing, because no factual disputes existed. The State cannot be heard to complain here that both the district court and court of appeals took it at its word.

For that reason, the State's reliance on Weisgram is misplaced. Weisgram, in fact, supports the conclusion of the court of appeals. Weisgram, a case under Fed.R.Civ.P. 50, held that the court of appeals properly reversed a jury verdict for the appellee and issued judgment in favor of the appellant without a remand to the trial court for additional hearings. 120 S.Ct. at 1022. Similarly, here, the court of appeals correctly entered judgment for the Smith.

The State claims that this Court's decision in Weisgram supports its position that it was

somehow unfair to issue judgment in favor of Smith. But in Weisgram, this court wrote, "'[a] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk.'" 120 S.Ct. at 1021. The State's strategic decision to not dispute the facts on which Smith based his ineffective counsel claim was similarly indulged at its own risk.

The state is also wrong that Fed.R.Civ.P. 56(e) required Petitioner submit these facts to the District Court by affidavit. Because the state never met its initial burden of "identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact," T.W. Electrical Service Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 630 (9th Cir. 1987)[4], and in fact, never even disputed the truth of these facts or the way in which they were presented, Fed.R.Civ.P. 56(e) is inapplicable.

Finally, Edwards v. Carpenter, ___ U.S. ___ ,120 S.Ct. 1587 (2000), on which the State relies is neither directly, or by analogy, applicable. [cert pet. At 17]. Edwards decided that a habeas petitioner could not use counsel's ineffectiveness as cause to overcome a procedural default unless that that claim was presented to the state courts in a procedurally appropriate manner that allowed the state courts to consider it on the merits. 120 S.Ct. at 1591. There is no dispute here that the state courts considered Smith's ineffective counsel claim on the merits without an evidentiary hearing at which the evidence supporting this claim, including Dr. Tatro's findings could be presented.

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[4] The State admits this critical point. "The party seeking summary judgment must initially identify for the district court the basis for its motion, and those portions of the adverse party's pleadings, depositions, and affidavits, if any, that the moving party believes demonstrate the absence of a genuine issue of material fact." Petition at 10-11.

The court of appeals properly considered this report to illustrate the nature and quality of mitigation that could have been developed in the trial court had counsel investigated and discovered relevant evidence.

The court of appeals committed no error in relying on these undisputed facts.

Thus, the only question before the court of appeals was whether the undisputed facts established ineffective assistance of counsel as a matter of law. See Glass v. Drachel, 2 F.3d 733, 739 (9th Cir. 1993)("If the court concludes that the same undisputed facts entitle either party to relief, it can so state."). As we discuss below, the court of appeals properly applied the undisputed facts to the law and concluded that the District Court erred in applying Strickland.

II. THE COURT OF APPEALS DECISON TO GRANT HABEAS RELIEF ON SMITH'S SENTENCING CLAIM RATHER THAN REMAND FOR AN EVIDENTIARY HEARING DOES NOT CONFLICT WITH THE LAW IN THE IN THE COURT OF APPEALS BELOW OR ANY OTHER CIRCUIT COURT OF APPEALS

The court of appeals also did not err in granting a new sentencing hearing based on the undisputed facts, rather than remand for an evidentiary hearing that the State so vigorously opposed below. The State alleges that the court of appeals opinion is irreconcilable with Wallace v. Stewart, 184 F.3d 1112 (9th Cir. 1998), and Correll v. Stewart, 137 F.3d 1404 (9th Cir 1999), where the court of appeals reversed the lower court's grant of summary judgment, and remanded for an evidentiary hearing. It is not. Unlike here, in both Wallace and Correll, the district courts refused to consider material facts supporting the petitioners' claims because they had not been presented in state court. Wallace, 184 F.3d at 1115, n.4; Correll, 137 F.3d at 1413.[5] The district

[5]Although Smith sought an evidentiary hearing to resolve any disputed facts, the State opposed it, explaining that "Petitioner [Smith] is not entitled to relief as a matter of law. No (continued...)

court here considered the undisputed facts supporting relief.

Thus, the court of appeal's opinion is entirely consistent with Wallace and Correll. It is also consistent with Smith (Bernard) v. Stewart, 140 F.3d 1263, 1268, 1274 (9th Cir. 1998), cert. denied, 525 U.S. 929 (1998). There the district court granted summary judgment based on the "undisputed" facts. The Ninth Circuit found that the district court erred in applying Strickland to those facts. For that reason, it reversed the district court's decision denying habeas relief, and remanded for a new sentencing hearing.

Here, the court of appeals, also disagreed with the legal conclusion the district court reached on this claim. Because there were no "genuine issues of material fact" as to this claim, the court's review was limited to determining "whether the district court correctly applied the relevant substantive law." Rano v. Sipa Press, 987 F.2d 580, 584 (9th Cir. 1992). On that point, it properly decided that the District Court did not--that sentencing counsel's performance was deficient and prejudiced Smith. Having reached that conclusion, the court of appeals directed habeas relief be granted on this claim. This was entirely appropriate under well-settled summary judgment law.

> The reason that appellate courts, when reversing a grant of summary judgment, typically do not direct the district court to enter summary judgment in favor of the appellant is because a genuine issue of material fact remains. But, in instances in which the facts and law establish that the appellant is entitled to judgment as a matter of law, we are free to direct the district court to enter judgment in appellant's favor.

Swaback v. American Information Technologies Corporation, 103 F.3d 535, 544 (7th Cir. 1996)(citation omitted). The court of appeals acted properly.

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[5](...continued)
hearing on the merits is required." DOC93, at 25.

III. THE COURT OF APPEALS DID NOT ERR IN APPLYING STRICKLAND'S PREJUDICE PRONG TO COUNSEL'S DEFICIENT PERFORMANCE.

The State does not dispute the court of appeals's finding that Mr. Smith's counsel's performance at his resentencing was deficient under Strickland. Instead, the state complains that the court's analysis of the prejudice prong was based on "speculation." It was not. It was based on the legal analysis Strickland requires the federal court to undertake. Strickland requires the reviewing court to decide whether there is a reasonable probability that absent counsel's unprofessional errors the result of the proceeding would have been different. 466 U.S. at 694. The State's real argument is that Strickland requires a showing of certainty, rather than reasonable probability. The Strickland hurdle is not that high. It does not require the reviewing court to determine the impossible: what the factfinder would have found. See Williams v. Taylor, ___ U.S. ____, 120 S.Ct. 1495, 1514-1515 (2000).

The court of appeals properly applied Strickland's prejudice prong in concluding that Mr. Smith had been prejudiced by his counsel's omissions at his capital resentencing. It accurately described the standard for determining whether counsel's "deficient performance [] prejudice[d] [Mr. Smith's] case": "There must be a reasonable probability, sufficient to undermine confidence in the outcome, that the result of the proceeding would have been different but for counsel's errors", citing Strickland, 466 U.S. at 694. Smith v. Stewart, 189 F.3d at 1008.

The court then exhaustively reviewed, just as it had exhaustively reviewed counsel's deficient performance,[6] the "clear" available evidence counsel "could have raised" at the

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[6]The court of appeals exhaustively reviewed counsel's deficient performance at resentencing: Counsel "did nothing." He "did not do any investigation." Id., at 1009. He did not (continued...)

resentencing: Mr. Smith has a split personality. "The defense's own investigator witnessed evidence of multiple personalities. A friend of Smith's who was also a pastor believed that Smith possessed multiple personalities." The prosecutor at Mr. Smith's guilty plea expressed doubts "as to Mr. Smith's lack of emotional stability." Mr. Smith's "split personality arose from his disturbing family background" as did his "serious psychosexual problems stemming from developmental problems and conflicts with his parents." Mr. Smith had "paranoid, manic and impulsive behaviors, ""well-documented mood swings from depression to paranoia," lost "contact with reality" when conflicts became unbearable, and had tried to kill himself. Id., at 1009-10, 1012. Mr. Smith also had a "good relationship with his girlfriend." Id., at 1010. Under Arizona law, these facts that counsel could have, but did not, investigate and present, are recognized mitigating circumstances. Smith (Bernard) v. Stewart, 140 F.3d at 1270-1271 (personality disorders and good family relations constitute mitigating circumstances under state law); State v. Trostle, 951 P.2d 869, 884-887 (1997)(mental impairment, including impulsive conduct, especially under stress and conduct and personality disorders, abusive childhood, and

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[6](...continued)
"call any witnesses." Id., at 1008. He did not present "any additional mitigating evidence." He did not present or even argue any nonstatutory mitigating circumstances even though resentencing was required because Arizona death penalty statute had been amended to allow him to present any mitigating circumstances, even nonstatutory, "bearing on Smith's mental and emotional condition, as well as his background and character, that might avoid the penalty of death." Id., at 1009. Instead, counsel "rest[ed] on the testimony" of two experts whose opinions at the initial sentencing the state courts had rejected as "not rising to the level of mitigation," although counsel at resentencing never even argued that their testimony established nonstatutory mitigation under the newly amended statute. Id. The court of appeals found that counsel's "failure to investigate Smith's background and mental illness was not a strategic decision," that counsel had not "tried a death penalty case before," and "admitted that he did not investigate Smith's case for mitigating evidence," and "did not understand what evidence constituted mitigating evidence." Id., at 1010.

good familial relationships constitute mitigating circumstances); State v. King, 883 P.2d 1024, 1043-44 (1994)(traumatic childhood, dysfunctional family, mental disorder, personality disorder, and family that loves him constitute mitigating circumstances); State v. Stuard, 863 P.2d 881, 902 (1993)(mental impairment and serious personality disorders constitute mitigating circumstances).

The court of appeals then analyzed the "effect of the failure to present mitigating evidence in light of the aggravating circumstances present in this case." Smith v. Stewart, 189 F.3d at 1013. The trial court found "no mitigating circumstances". Id. at 1008. Under these facts, where aggravating circumstances are found, but no mitigating circumstances are found, "the balancing stage of the [life or death] inquiry" is "never reached." State v. Spencer, 859 P.2d 146, 154 (1993). Instead, upon the finding of no mitigating circumstances, a death sentence is "expressly required." Id. That is what happened here. Thus, the court of appeals properly concluded that Mr. Smith's counsel's "failure to do anything but offer evidence that the sentencing judge clearly rejected the first time around was a virtual admission his client should be put to death." Smith v. Stewart, 189 F.3d at 1013. The court of appeals concluded that it "could not say with any confidence" that the result would have been the same had the sentencing court been presented with the available mitigating evidence. Id., at 1014.

In reaching this conclusion, the court of appeals did not speculate. It engaged in legal analysis using the facts the state agreed were uncontested.

Though not a part of the questions presented, and therefore, not reviewable on certiorari, the State claims that Smith's mitigation evidence would not have provided a causal link between the mitigation and the crime which is purportedly required by Arizona law.

The State is wrong for two reasons. First, the mitigating evidence of dysfunctional childhood does specifically relate to Mr. Smith's ability to control his conduct at the time of the crimes. Smith v. Stewart, 189 F.3d at 1012. Second, in assessing prejudice, this Court must assume that the sentencer considering this evidence will act lawfully. Strickland v. Washington, 466 U.S. at 695. Evidence of a disturbed childhood is mitigating under Arizona law even if it does not establish a "causal link" to or excuse the defendant's conduct at the time of the crimes. See also State v. Thornton, 929 P.2d 676, 685 (1996).[7]

Moreover, Smith has presented far more mitigating evidence than that of a dysfunctional childhood.

At bottom, the State's true argument here is that the dissent's analysis is "more realistic and objective than that of the majority." Petition at 25. Certiorari is inappropriate for this Court is not in the business of conducting third tier review of such disputes.

IV. THE COURT OF APPEALS DECISION IS CORRECT

Because the court of appeals correctly decided that Smith was prejudiced by counsel's abysmal performance, they never reached Smith's argument that he need not show prejudice because, under the extreme facts of this case, his counsel's actions and omissions amounted to the complete abandonment of counsel and therefore, under this Court's opinions, prejudice is presumed. United States v. Cronic, 466 U.S. at 659 (1984)("If counsel entirely fails to subject

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[7]While the Arizona Supreme Court has stated in some cases that an abusive or disturbed childhood is not mitigating unless it excuses the defendant's actions at the time of the crimes, State v. Atwood, 832 P.2d 593, 672 (1992), it has also held in a number of cases that such evidence is indeed mitigating despite such a "link", although entitled to less weight than it would be given if it excused the crime. See, e.g., State v. Hedlund, 917 P.2d 1214, 1227(1996); State v. Hurles, 914 P.2d 1291, 1299 (1996); State v. Spears, 908 P.2d 1062, 1078 (1996).

the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that make the adversary process itself presumptively unreliable.") See also, Williams, 120 S.Ct. at 1512 ("[T]here are a few situations in which prejudice may be presumed.")

At resentencing, counsel had the rare benefit of knowing that the Arizona Supreme Court would uphold the finding of three statutory aggravating circumstances. He also knew, because the court had said so, that the evidence from the first sentencing was insufficient to support statutory mitigating circumstances. Yet, despite this knowledge counsel, did nothing, even though the law now entitled him to present nonstatutory mitigating evidence calling for a life sentence. By doing nothing counsel knew he was abandoning his client to a fate of death. There was no other option open to the trial judge under Arizona law.

Counsel candidly told the court, two decades ago, that he did not know how to represent Smith. Yet, the court did nothing.

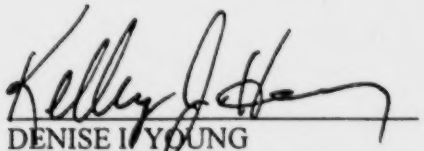
While the record supports a finding of ineffective counsel under Cronic, without even considering whether prejudice was established, the court of appeals did not err in finding prejudice here where counsel "effectively presented no defense on Smith's behalf, amounting to abandonment of his client to the fate of death," particularly under a statutory scheme, like Arizona's, that requires death be imposed. Smith v. Stewart, 189 F.3d at 1011.

CONCLUSION

The decision of the court of appeals below is fact intensive, reasonably considered and supported by other decisions regarding the duties of competent counsel at the capital sentencing proceedings. Nothing in this case warrants this Court's certiorari review

The writ should be denied.

Respectfully submitted this 18th day of September, 2000.



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No. 00-110

IN THE SUPREME COURT OF THE UNITED STATES

TERRY STEWART,
Director, Arizona Department of Corrections, et al.,
Petitioners,

v.

JOE CLARENCE SMITH, JR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CERTIFICATE OF SERVICE

Kelley J. Henry hereby states:

Pursuant to Supreme Court Rule 29, on the 18th day of September, 2000, I caused to be mailed a typescript copy of the *Application for Extension of Time to File Opposition to Petition for Writ of Certiorari* in this case by United States Mail, first class postage prepaid, to:

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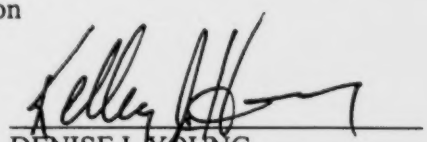

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